United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4085

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

No. 76-4085

STATE OF NEW YORK,

Petitioner,

v.

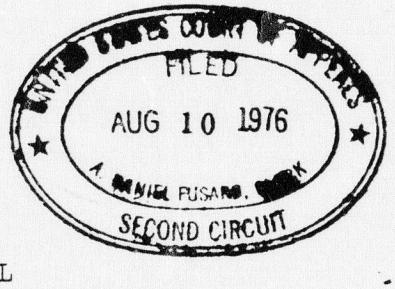
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents.

B
P/S

ON PETITION FOR REVIEW OF ORDER OF
INTERSTATE COMMERCE COMMISSION

BRIEF FOR PETITIONER



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I

PRELIMINARY STATEMENT

This is an action seeking review of a Report and Order of the Interstate Commerce Commission, served February 11, 1976, entered in Investigation and Suspension Docket No. 8899, *Unit Train Rates on Wheat, Minn. & Wisc. to Martins Creek, Pa.* The decision was rendered by the Commission's Division 2, acting as an Appellate Division, Commissioners Brown, MacFarland, and Corber, and is reported at 351 I.C.C. 470.

The Report and Order of Division 2, Commissioners Brown, Hardin, and Clapp, served July 18, 1974, which the Appellate Division Report and Order adopts, in part, is reported at 346 I.C.C. 814.

II

JURISDICTIONAL STATEMENT

Jurisdiction is founded on Section 2342(5) of the United States Code, 28 U.S.C. § 2342, as amended, 28 U.S.C. § 2342(5) (Supp. 1, 1975), which empowers this Court to review orders of the Interstate Commerce Commission. Venue in this Court is founded on Section 2343 of the United States Code, 28 U.S.C. § 2343.

III

STATUTES INVOLVED

Interstate Commerce Act, Section 3(1), 49 U.S.C. § 3(1):

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Interstate Commerce Act, Section 3(4), 49 U.S.C. § 3(4):

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

IV

QUESTIONS PRESENTED

(1) Whether the refusal of the Interstate Commerce Commission to protect water carriers from discriminatory and prejudical rail rates deprives water carriers of a statutory right conferred by the Congress under section 3(4) of the Interstate Commerce Act?

(2) Whether the Interstate Commerce Commission erroneously failed to protect the Port of Buffalo and other Buffalo interests from prejudicial and discriminatory rail rates and practices designed to divert wheat traffic away from Buffalo?

V

STATEMENT OF THE CASE

This action is brought by the State of New York to review an order of the Interstate Commerce Commission discontinuing its investigation into the lawfulness of unit train rates published on behalf of Soo Line Railroad Company (Soo) and Erie Lackawanna Railway Company (Erie). The rates apply to wheat moving in bulk over an all rail route extending from Minneapolis, Minnesota Transfer and St. Paul, Minnesota (Twin Cities), and Duluth, Minnesota and Superior, Wisconsin (Twin Ports), to Martins Creek, Pennsylvania. Two levels of rates are involved. The lower rate applies during the open season of navigation on the Great Lakes and the higher rate applies during the closed season. The lower rate is designed to compete with rates on a water/rail route moving wheat during the open navigation season by water from Twin Ports over the Great Lakes to the Port of Buffalo, New York, and thence by rail from Buffalo to Martins Creek. The higher rate is designed to compete with rates on an all rail route moving wheat during the closed navigation season from Twin Ports and Twin Cities to Martins Creek through Buffalo.

The Commission suspended the effective date of the rates pursuant to section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), thereby placing the burden of proving the rates lawful on the rail carriers. Following hearing, Division 2 of the Commission issued its initial decision, finding that the proposed rate from Twin Cities to Martins Creek, to apply during the open navigation season was unduly preferential to Twin Cities and unduly prejudicial to Twin Ports but that the proposal was otherwise lawful. *Unit Train Rates on Wheat*, 346 I.C.C. 814 (1974). (Joint Appendix (JA), pp. 440a-513a).

After issuance of the initial decision, the State of New York was permitted to intervene to consolidate the interests of parties representing various New York State interests (JA, p. 514a) and petitions for reconsideration were submitted. On reconsideration, Division 2 of the Commission, acting as an Appellate Division, denied the relief sought in the petition of the State of New York. (JA, pp. 613a-614a). Moreover, it reversed its prior finding that the rate from Twin Cities to Martins Creek was unlawful, and discontinued its investigation of the rates in all respects. *Unit Train Rates on Wheat*, 351 I.C.C. 470 (1976). (JA, pp. 615a-620a). Following issuance of the final order of the Commission, an appropriate and timely petition for review was filed with this Court by the State of New York and this brief is filed pursuant to the Scheduling Order of the Court dated March 29, 1976.

VI

PARTIES TO THE COMMISSION PROCEEDING

In addition to the State of New York, the proposal before the Commission was opposed and/or protested jointly or separately by the Niagara Frontier Transportation Authority, American Federation of Grain Millers, Grain Elevator Employees, International Association of Great Lakes Ports, International Longshoremen's Association, Buffalo Area Chamber of Commerce, Maritime Trades Department, Buffalo Port Council, Inland Boatmen's Union, Buffalo Typographical Union No. 6, Board of Trade of the City of Chicago, Great Lakes Ship Owners Association and individual members, Lake Carriers' Association and individual members, Kansas-Missouri River Millers, Penn Central Transportation Company, Kinsman Marine Transit Company, the Mayor

of the City of Buffalo and the County of Erie, New York, General Mills, Inc., International Multifoods Corporation, Peavey Company, The Pillsbury Company, Standard Milling Company, ADM Milling Company, Ross Industries, Inc., Maritime Administration, United States Department of Commerce, and Seaway Port Authority of Duluth, Minnesota. (See JA, pp. 1a-191a, 291a-308a.) The proposal was supported by Erie, Soo, ConAgra, Inc., Chicago, Rock Island and Pacific Railroad, and the Commonwealth of Pennsylvania. (See JA, pp. 192a-269a, 519a-522a, 604a-612a.)

VII

INTEREST OF STATE OF NEW YORK

The State of New York has a clear interest in protecting its citizens from the unlawful discriminatory and prejudicial rate proposal approved by the Commission. It stands in *parens patria* to the vessels calling at ports in New York State and the millers located in New York State. It has a vested interest in seeing that the Port of Buffalo is treated fairly and in accordance with law. To this end, it brings this action before this Court seeking to set aside the order of the Interstate Commerce Commission approving prejudicial rates.

VIII

STATEMENT OF FACTS

Wheat grown in the Dakotas and Minnesota moves to Twin Ports or Twin Cities and from these points to millers in the east including millers at Buffalo and the miller at Martins Creek, ConAgra, Inc. (346 I.C.C. at 818, 861; JA, pp. 445a, 488a).[1/] The millers grind the wheat into flour to be sold to

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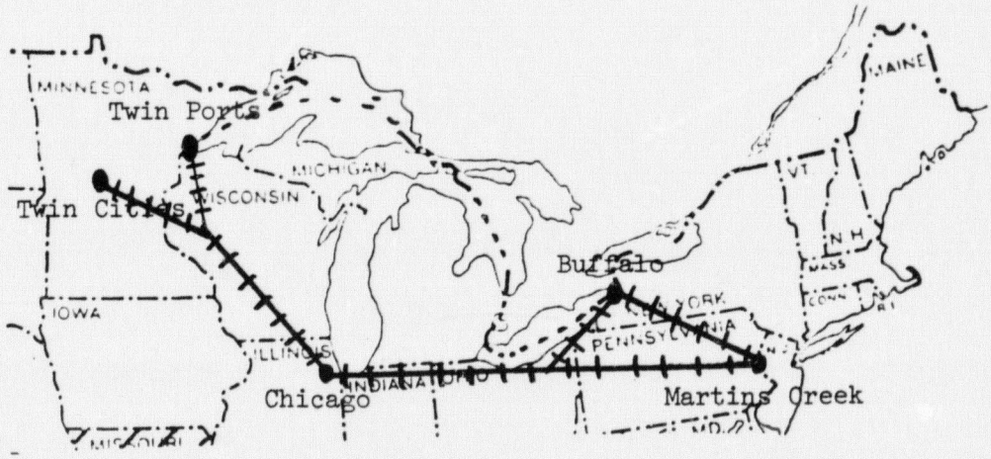
1/ All record citations in the Statement of Facts are to Division 2's initial decision reported at 346 I.C.C. 814 (1974). (JA, pp. 440a-513a). The Division, acting as an Appellate Division, adopted as its own the statement of facts set forth in the initial decision. 351 I.C.C. at 471. (JA, p. 616a).

bakeries along the eastern seaboard at such places as Philadelphia, Pa., Hackensack, N.J. and Brooklyn, N.Y. (346 I.C.C. at 863, 866; JA, pp. 490a, 493a). The Martins Creek mill is located about seven miles north of Easton, Pa. and within 75 to 90 miles of its bakery customers. The flour produced at Martins Creek is shipped to bakeries in motor vehicles. The Buffalo mills ship their flour to eastern bakeries by rail. (346 I.C.C. at 866; JA, p. 493a).

The wheat from Twin Ports can move to Buffalo over an all water route via the Great Lakes or it can move over an all rail route. The wheat destined to Martins Creek can move over a water/rail route composed of a water movement to Buffalo, thence by rail from Buffalo to Martins Creek. An all rail route from Twin Ports and Twin Cities to Martins Creek is also available. (346 I.C.C. at 816, 818; JA, pp. 443a-445a). Soo operates rail lines from Twin Cities and Twin Ports to Chicago where it connects with Erie. Erie operates a rail line from Chicago to Martins Creek, from Buffalo to Martins Creek and from Chicago to Buffalo. (346 I.C.C. at 816, 823; JA, pp. 443a, 450a). These railroads form rail routes from Twin Cities and Twin Ports to Martins Creek and to Buffalo, and the rail leg of the water/rail route via Buffalo. A straight line depiction of these routes is set forth below.



The rates in dispute apply to the all rail route from Twin Cities and Twin Ports to Martins Creek. Two levels of reduced rates were proposed -- one, a 72.25 cent rate per hundred pounds would apply during the open season of navigation on the Great Lakes; the other an 88 cent rate per hundred pounds would apply during the closed navigation season.[2/] The 88 cent rate would be in effect from December 15 through March 31, and the lower 72.25 cent rate designed to compete with the water transportation would be in effect from April 1 to December 14. (346 I.C.C. at 816; JA, p. 443a). Erie's division or share of the 88 cent rate is 57 cents and its share of the 72.25 cent rate is 47 cents. (346 I.C.C. at 816; JA, p. 443a). The rail distance from Twin Ports to Martins Creek is about 1,379 miles and the distance from Chicago to Martins Creek is about 910 miles. (346 I.C.C. at 829, 849; JA, pp. 456a, 476a).

Prior to the establishment of the reduced rates and at the time of the hearing, ConAgra obtained its wheat through Buffalo. (346 I.C.C. at 829; JA, p. 456a). Much of this wheat moved from Twin Ports to Buffalo by lake vessel transportation and from Buffalo to Martins Creek by rail or motor carrier. (346 I.C.C. at 818, 829; JA, pp. 445a, 456a). Erie handled the rail portion of the water/rail movement under a 40 cent rate from Buffalo to Martins Creek. The rail distance from Buffalo to Martins Creek is about 340 miles. (346 I.C.C. at 829; JA, p. 456a).

The table below sets forth the rail charges under the common denominator of the charges per hundred pounds, per mile:

Rail Route	Rate		Mileage		100 Pounds Per Mile
Twin Ports to Martins Creek	72.25¢	+	1,379	=	.0524
Chicago to Martins Creek*	47¢	+	910	=	.0516
Buffalo to Martins Creek	40¢	+	340	=	.1176

* Erie's share of the proposed 72.25 cent rate.

2/ The existing single-car rail rate from Twin Cities and Twin Ports to Martins Creek was $1.05, or 32.75 cents higher than the proposed 72.25 cent rate. (346 I.C.C. at 849; JA, p. 476a).

Stated in everyday language the table shows, for example, that Erie's yield in transporting 100 pounds of wheat one mile when it moves from Buffalo to Martins Creek is more than twice as much as it receives when it transports 100 pounds of wheat one mile when the wheat moves over the Erie portion of the all rail route from Chicago to Martins Creek.

The relationship of the rates to Erie's fully allocated costs over the Buffalo to Martins Creek route versus the Chicago to Martins Creek route is set forth by the Commission as follows:

> Protestants also developed ratios of rates to costs for both the existing Buffalo to Martins Creek rate and Erie's division of the proposed rates. Thus the 40-cent Buffalo to Martins Creek rate yields 142 percent above variable costs for movements in railroad cars and 178 percent for shipper cars. On a fully allocated basis the excess is 73 and 90 percent, respectively. In comparison, the proposed rates will yield only 68 percent above variable costs for shipments in railroad cars and 60 percent in shipper cars. On a fully allocated basis the excess [is] 18 and 14 percent, respectively. 346 I.C.C. at 830. (JA, p. 457a).

These studies were accepted by the Commission and the Commission noted that the rates on the Buffalo to Martins Creek route were substantially more profitable to Erie than its share of the rate on the all rail route from Twin Cities or Twin Ports to Martins Creek. (346 I.C.C. at 835; JA, p. 462a).

Historically, Buffalo has been a milling center and it has the largest milling capacity in the nation. In 1972, 45,322,000 bushels of domestic wheat moved from Twin Ports by water. Of this amount, 45,058,000 bushels moved to Buffalo. (346 I.C.C. at 818; JA, p. 445a). ConAgra's wheat requirements at its Martins Creek mill are 3,588,000 bushels annually. (346 I.C.C. at 861; JA, p. 488a). Diversion of this traffic to Martins Creek represents approximately eight percent of the domestic wheat lake vessel movement to Buffalo.

IX

SUMMARY OF ARGUMENT

Erie and Soo are lowering their rates on an all rail route to capture traffic moving over a water/rail route. The method used by the railroads is simple: The rail rates on the all rail route from Twin Ports and Twin Cities to Martins Creek are lowered and at the same time the rail rates (from Buffalo to Martins Creek) on the water/rail route are held up to a level that assures that the traffic will be diverted from the water/rail route to the all rail route. This results in Erie offering lower rail rates when it connects with a fellow railroad at Chicago than when it connects with water carriers at Buffalo. The unjustified maintenance of a rate disparity between connecting lines is prejudicial and discriminatory and is specifically prohibited by section 3(4) of the Interstate Commerce Act. In this case, the Commission erroneously refused to protect the connecting water carriers from the unlawful rail rates.

Not only does the reduction of rates on the all rail route discriminate against connecting carriers, it also discriminates against the Port of Buffalo and other Buffalo interests. Because of Buffalo's location and port facilities, wheat traffic to Martins Creek has moved through Buffalo. Erie would divert traffic away from Buffalo by maintaining the high rail rate from the Port of Buffalo and a low rail rate from Chicago. This conduct is disadvantageous to Buffalo and is prohibited by section 3(1) of the Interstate Commerce Act. Erie and Soo are also giving preference to Martins Creek traffic by offering that point a rail rate competitive with a water/rail rate during the months when the Great Lakes are navigable. However, they do not offer Buffalo a competitive rail rate when the Great Lakes are navigable. Such conduct is similarly prohibited by section 3(1) of the Interstate Commerce Act.

X

ARGUMENT

A. The Commission Erroneously Failed To Protect Water Carriers Transporting Wheat To The Port Of Buffalo As Required By Section 3(4) Of The Act

The Commission held that water carriers transporting wheat from Twin Ports to the Port of Buffalo are not entitled to protection against discriminatory or prejudicial rail rates under section 3(4) of the Interstate Commerce Act, 49 U.S.C. § 3(4). (346 I.C.C. at 852, affirmed 351 I.C.C. at 472, 479; JA, pp. 479a, 617a, 620a). This failure to afford protection under section 3(4) deprives the water carriers calling at the Port of Buffalo of their statutory right and compels this Court to hold the Commission order unlawful as required by section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. As pertinent, section 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

The statutory right of water carriers to protection is evidenced by the clear intent of section 3(4), the plain language used in the statute, the controlling court precedent, and the undisputed facts of record. Section 3(4) plainly prohibits railroads from discriminating in their rates between

"connecting lines" and from unduly prejudicing any "connecting line" in the distribution of traffic. The last sentence of section 3(4) recites that connecting lines to be protected shall include ". . . any common carrier by water subject to part III."[3/] Here the Commission, without discussion, holds that water carriers on the Great Lakes are not connecting lines and disposes of this crucial issue with the following four short sentences:

> So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4). Aside from this, however, it is clear that there is no merit in protestant's argument. Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffalo and Erie does not extend unequal treatment at Buffalo as between carriers. 346 I.C.C. at 852. (JA, p. 479a).

We submit that these findings are patently erroneous and contrary to applicable law.

1. Water Carriers Transporting Grain On The Great Lakes Are Subject To Part III

Water carriers filing protests and/or opposing the reduced rail rate proposal are subject to part III of the Interstate Commerce Act. Document No. 6 listed in the Commission Certified Index to the Record (JA, pp. 37a-41a) is a protest filed on behalf of the Great Lakes Ship Owners Association and its individual members, including Bison Steamship Company, The Copper Steamship Company, Roen Steamship Company and Steel Products Steamship Company. The first sentence of Document No. 6 reads:

> Comes now Great Lakes Ship Owners Association and its individual member companies who are common carriers by water holding certificates of public convenience and necessity issued under Part III of the Interstate Commerce Act, ... (JA, p. 38a).

3/ Part III referred to is part III of the Interstate Commerce Act, 49 U.S.C. § 901, *et seq.*

The Commission's public records show that a certificate was issued to Bison Steamship Company in W-772, The Copper Steamship Company in W-769, and Steel Products Steamship Corporation in W-765. The operations of Roen Steamship Company were exempted from regulation in W-675. Document No. 7 of the Certified Index to the Record (JA, pp. 42a-64a) is a protest and petition filed on behalf of Lake Carriers' Association. The appendix to that document contains a list of member companies including Oglebay Norton Company. (JA, p. 64a). The Commission's own public records show that Oglebay Norton Company holds a certificate in W-773. These certificates were issued under section 309 of part III, 49 U.S.C. § 909, and make the carriers subject to part III. Under these circumstances, and in view of the importance of navigation on the Great Lakes, it is illogical to assume that the Commission, in its expertise, was unaware of the fact that there are water carriers on the Great Lakes subject to part III.

What the Commission may have intended to state is the proposition that since wheat traffic on the Great Lakes is not subject to regulation under part III, section 3(4) is not applicable here.[4/] However, this proposition is equally erroneous. The first test case before the Supreme Court under section 3(4) following its amendment in 1940 should have put this contention to rest once and for all. In *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, 67 S. Ct. 894 (1947), the Supreme Court stated:

> In addition § 3(4) of the preexisting Act which forbade carriers "to * * * discriminate in their rates, fares, and charges between connecting lines," 41 Stat. 479, was amended by the 1940 Act specifically to include water carriers, such as these barge lines, within the definition of connecting carriers. 330 U.S. at 576.

4/ Section 303(b), 49 U.S.C. § 903(b) exempts from regulation the transportation of commodities in bulk such as wheat.

The traffic involved in the *Mechling* case was grain, an exempt commodity. This same point was also forceably made in *Arrow Transportation Co. v. United States*, 176 F. Supp. 411 (N.D. Ala. 1959). In the *Arrow* case which also involved the movement of grain by water the Court flatly stated:

> The contention is advanced with apparent seriousness by some of the intervening defendants that Arrow is not a connecting carrier in relation to the railroads which serve the Tennessee River ports. This argument is wholly without merit. At each of the Tennessee River ports there are facilities by which grain can be transferred directly from barges into rail cars, but the normal type of transfer is through an elevator. We hold that Arrow is a connecting carrier of the outbound rail carrier when it delivers grain in its port-to-port service to a river elevator or other unloading facility which has a rail connection for the subsequent reshipment of that grain. Nothing more was shown in Mechling or exists at Memphis, and, in our opinion, nothing more was intended by Congress in amending section 3(4) of the act. [Footnotes omitted.]
> 176 F. Supp. at 419.

More recently, in *Valley Line Company v. United States*, 390 F. Supp. 435 (W.D. Pa. 1975), the Court was called upon to review the Commission's interpretation of the words "water carrier subject to part III" appearing in section 5(13) of the Act, 49 U.S.C. § 5(13). The Commission had ". . . held that Cenac Towing Co. whose transportation operations are exempted from regulation by the Commission, is not a 'carrier' with the meaning of section 5(13) of the Interstate Commerce Act." 390 F. Supp. at 438. The Court struck down the Commission's interpretation stating:

> The Commission's decision that it does not have jurisdiction over the acquisition of Cenac by Katy is bottomed upon the conclusion that Cenac is not a carrier within the meaning of section 5(2) of the Act. This holding is in turn based upon the conclusion that since Cenac operates under temporary exemptions granted by the Commission under section 302(e) of the Act, Cenac is not a "water carrier subject to Part III" of the Act, within the meaning of section 5(13) and, therefore, the proposed acquisition and control of Cenac by Katy is not control of a second carrier within the Commission's jurisdiction under section 5(2).

> However, the exemption provision of section 302(e) of the Act by its terms is limited to exemption "from the provisions of *this part*" [meaning part III of the Interstate Commerce Act as amended]. The provisions of section 5(2) of the Interstate Commerce Act relating to protection of the public interest with respect to mergers and concentration of control over carriers are not found in "this part" but in Part I of the Act. In modified form, these provisions are derived from policies embodied in the original Interstate Commerce Act of 1887. They are of general importance, and quite distinct from the specific regulatory requirements with respect to water carriers established by Part III in 1940. [Footnote omitted.]

In view of the Commission's own public records, the record documents in this proceeding and the clear pronouncement of the Courts, we submit that the Commission's finding that water carriers transporting wheat on the Great Lakes are not entitled to protection under section 3(4) is clearly erroneous.

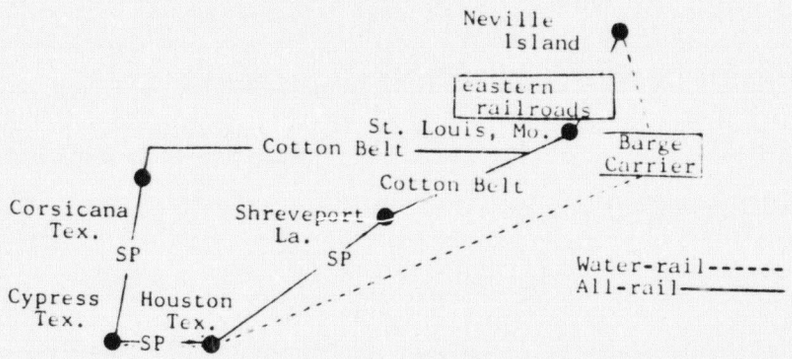
2. A Common Point Of Interchange Is Not A Prerequisite To Protection Under Section 3(4)

The Commission also states that section 3(4) affords connecting water lines protection against discriminatory and prejudicial rail rates only when the rail carrier connects with the water carrier at the same point as it connects with its fellow rail partner. In this case, the Commission denies section 3(4) protection to water carriers because the point of connection between Soo and Erie, namely Chicago, is different from the Buffalo point of connection between Erie and the water carriers. This view is in direct conflict with controlling Court opinion and controlling opinion of the entire Commission. 5/

5/ An opinion of the entire Commission is binding on any one division of the Commission such as Division 2 which rendered the opinion in the instant case.

In *Ingot Molds, Ohio & Pa. to Cypress, Tex.*, 349 I.C.C. 102 (1975), the entire Commission was called upon to determine whether a reduced rail rate on an all rail route from Neville Island, Pa. to Cypress, Tex. discriminated against water carriers party to a potential water/rail route. The Commission's description and depiction of the routes are as follows:

> With regard to the competing all-rail and barge-rail routes, the last leg of both is via the SP--with the barges interchanging at Houston, Tex., and the railroads interchanging at . . . Corsicana, Tex., as depicted below: 349 I.C.C. at 107.



The proponents of the all rail rate had argued that there could be no section 3(4) violation because there was no common point of interchange. However, the entire Commission, in a case declared to be one involving an issue of general transportation importance, rejected a common point of interchange as a condition precedent to section 3(4) protection, and flatly stated that ". . . a common interchange point is not required in a water-rail situation under section 3(4)." 349 I.C.C. at 111.

The all rail route composed of the SP's connection with the Cotton Belt at Corsicana is comparable to the all rail route composed of Erie's connection with Soo at Chicago, and the SP's connection with water carriers at Houston is comparable to Erie's connection with water carriers at Buffalo.

Hence, water carriers protected by the entire Commission in the *Cypress* case stand in no different position than connecting water carriers in the instant case. Division 2's denial of section 3(4) protection, therefore, simply cannot be justified on the basis that the water carriers here connect with Erie at Buffalo while Erie connects with Soo at Chicago.

Since the Commission held that water carriers calling at the Port of Buffalo are not entitled to section 3(4) protection, it did not specifically consider the question of prejudice and discrimination under section 3(4). The evidence of record and applicable law, however, amply demonstrates the discriminatory and prejudicial effect of the railroads' proposal.

3. The Rate Reduction On The All Rail Route Is Discriminatory And Prejudicial To Water Carriers Connecting At Buffalo

Although the Commission never formally reached the issue of whether the reduced rates were discriminatory and prejudicial under section 3(4) it is clear from the Commission's own findings that there is a *prima facie* showing of a violation of the Act. In *Seatrain Lines, Inc. v. United States*, 233 F. Supp. 199 (D. N.J. 1964), the Court found that unjustified rate disparities were *prima facie* evidence of discrimination:

> We are satisfied, upon a review of the record as a whole, that Seatrain established a prima facie case of discrimination, and that thereupon the burden passed to the western railroads to show by some evidence, cost or otherwise, that the difference in transportation conditions justified the rate disparities shown to exist in this case. See Chesapeake & Ohio Railway Co. v. United States, 11 F.Supp. 588 (S.D.W.Va. 1935), aff'd 296 U.S. 187, 56 S.Ct. 164, 80 L.Ed. 147; Atchison, Topeka and Santa Fe Railway Co. v. United States, 218 F.Supp. 359 (N.D.Ill. 1963). 233 F. Supp. at 210.

The evidence of rate disparity adopted by the Court in *Seatrain* showed that the rail rate yielded 115 percent of fully distributed costs over the all rail route but that the rail rates on the connecting rail legs of a water/rail route were 341 percent of fully distributed rail costs on the originating rail leg and 170 percent of fully distributed rail costs on the delivering rail leg. 233 F. Supp. at 210.

Here, cost studies accepted by the Commission showed that Erie's yield under the reduced rate on the all rail route was 18 percent of fully distributed rail costs in rail-owned cars and 14 percent in shipper-owned cars whereas Erie's yield in the rail leg of the water route was approximately four to six times higher -- 73 percent of fully distributed rail costs for rail-owned cars and 90 percent for shipper-owned cars. The evidence here also shows that Erie would receive 40 cents to transport one hundred pounds of wheat the 340 miles from Buffalo to Martins Creek but that it would only receive 47 cents per hundred pounds during the open navigation season and 57 cents per hundred pounds during the closed navigation season to transport wheat the 910 miles from Chicago to Martins Creek. Obviously then, there is a rate disparity and the only question left is whether such disparity is justified.

The proper test for determining whether a section 3(4) violation exists was discussed in *Western Pacific Railroad Company v. United States*, 263 F. Supp. 140 (N.D. Cal. 1966). There the Commission had rejected Western Pacific's contention that a section 3(4) violation existed on the ground that "the evidence of record does not establish the similarity of circumstances and conditions which justifies the equality of treatment." The Court stated:

> The very form of this finding suggests that the decision of the Commission in this case was based upon a test quite different from, and far more lenient in favor of defendants, than the test stated by the Supreme Court, which is, not whether similarity of circumstances and conditions justify equality of treatment, but whether dissimilarity of conditions and circumstances justify the discrimination.
>
> The burden of proof is not upon Western Pacific to show similarity of circumstances to justify their claim for equality of treatment, but only to show that a discrimination is practiced by defendants as between Western Pacific and the other Bieber route carriers, on the one hand, and the Southern Pacific, on the other, in respect to the existing joint through rate arrangement. The burden of proceeding would then shift to defendants to prove some dissimilarity of operating conditions that would substantially affect them in the event they were required to grant equality of treatment. See Seatrain Lines, Inc. v. United States, 233 F. Supp. 199, 210 (D.N.J.1964); Atchison, Topeka & Santa Fe R. Co. v. United States, supra at 374. 263 F. Supp. at 145-146.

Under the test in the *Western Pacific* case it is clear that the rail carriers have not met their burden of justifying Erie's unequal treatment of the connecting water carriers. The rate on the Buffalo to Martins Creek route is 142 percent above variable costs and in excess of 73 percent of fully allocated costs. No transportation justification for the maintenance of such a high level of rail rates from Buffalo to Martins Creek has been presented.[6/] Without such justification, the proposed rates are unlawful.

B. Reduced Rates On The All Rail Routes Result In Undue Prejudice And Disadvantage To The Port Of Buffalo Under Section 3(1) Of The Act

Section 3(1) of the Interstate Commerce Act prohibits any railroad from subjecting ". . . any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region,

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6/ Indeed, it is doubtful if any justification is possible in view of the Commission's findings regarding the profitability of the Buffalo to Martins Creek rate.

or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Although the Commission did not hold that the Port of Buffalo and other Buffalo interests were not entitled to protection under section 3(1) it did, in fact, fail to extend protection to the Buffalo interests. This failure is unlawful and patently erroneous as a matter of law.

1. Failure To Lower The Rail Rates From Buffalo To Martins Creek Is Prejudicial And Disadvantageous To Buffalo Interests

One aspect of the patent disadvantage to the Port of Buffalo and the Buffalo interests resulting from the violation of section 3(1) is evidenced by the same facts showing discrimination and prejudice to connecting water carriers under section 3(4) of the Interstate Commerce Act. A recent case closely paralleling the one before this Court aptly demonstrates the section 3(1) violation. *Lake Carriers' Association v. United States*, 399 F. Supp. 386 (N.D. Ohio 1975). That case involved reduced rail unit train rates on coal over an all rail route extending from mines in Ohio to a consuming utility at Detroit, Mich. Previously, the coal had moved over a rail/water route with the rail movement being from the mines to lake ports such as Toledo, Sandusky, Lorain and Ashtabula, Ohio. The coal then moved by water to Detroit, Mich. However, upon institution of unit train service at lower rates the all rail route captured the traffic. 399 F. Supp. at 388. Meanwhile, the railroads refused to provide the ports with unit train service at lower rates. The Court found that the railroads' refusal to offer comparable rail service on the rail leg of the rail/water route was prejudicial to the lake ports as well as water carriers calling at the lake ports and violated section 3(1) as a matter of law.

As stated by the Commission in the initial decision, 346 I.C.C. at 854 (JA, p.481a), a violation of section 3(1) is shown when (1) there is a disparity in rates, (2) there is actual or potential harm, (3) the carriers are the common source of the prejudicial treatment, and (4) the disparity of rates is not justified. A definite disparity has been shown to exist between the rail rates offered from Buffalo to Martins Creek and those offered in connection with all rail service via Chicago to Martins Creek. The diversion of the movement of some 3,500,000 bushels of wheat away from the Port of Buffalo shows actual or potential injury to the Buffalo interests, and Erie is the common source of the disadvantage and prejudice. At this point the burden of justifying the disparity shifts to the carriers. Here there was no justification for maintenance of the high Buffalo to Martins Creek rail rate. Accordingly, the carriers' lowering of the rail rate on the all rail route and the failure to make comparable adjustments of the rail leg of the water/rail route amounts to a violation of section 3(1) as a matter of law.

2. Failure To Lower Rates On The All Rail Route To Buffalo Is Prejudicial And Disadvantageous To Buffalo Interests

Not only does the reduced rate on wheat over the all rail route to Martins Creek prejudice the movement of wheat <u>through</u> the Port of Buffalo, it also places Buffalo at a disadvantage with respect to wheat moving <u>to</u> Buffalo over the all rail route to Buffalo. Soo and Erie publish a unit train rate from Twin Ports to Buffalo which is designed to provide an alternative to the practice of storing wheat in vessels during the closed season of navigation. This rate is not competitive with the lake vessel charges available during the

open season of navigation. Indeed, as the Commission noted in the initial decision, 346 I.C.C. at 843 (JA, p. 470a), in the ten years since the rate was first established, all of the Buffalo unit train movements, with but one possible exception, have moved during the season of closed navigation. The 72.25 cent Martins Creek rate is designed to divert traffic from the water/rail route during the open season of navigation, and it is a rate competitive with the water/rail rate. Hence, Soo and Erie are offering Martins Creek an alternative competitive means of transporting wheat during the open season of navigation. At the same time, these carriers are holding the Buffalo unit train rate up to such a high level that it moves no traffic during the open navigation season. This in effect constitutes an embargo, and results in preferential treatment of Martins Creek and prejudicial treatment of Buffalo. Equal treatment requires that, if water competitive rates are to be available at all during the open navigation season, they be available to both Buffalo and Martins Creek.

The availability to Martins Creek of a water competitive rate during the navigation season obviously gives it an advantage over Buffalo. Martins Creek will have, while Buffalo will not have, an alternative means of transportation. This is important when, for one reason or another, shipping on the Great Lakes is interrupted, the closed season is longer than normal, or a shipper is unable to obtain vessels when they are needed.

Moreover, the water competitive rate gives the Martins Creek mill the option of shopping for the lowest transportation costs, an option that is unavailable to the Buffalo mills. While the carriers have stated their intention to adjust the 72.25 cent rate to reflect any changes in lake vessel

charges, such adjustments can be made only upon notice and are subject to review by the Commission. In contrast, lake vessel charges can be changed at will and with no notice at all. The record shows that lake vessel charges have increased almost 45 percent or about 7.5 percent a year from 1966 through 1971. (346 I.C.C. at 844; JA, p. 472). Taking into consideration the inevitable lag the rail carriers will experience in making adjustments in their rate and the continuing inflation, there will unquestionably be significant periods of time when the Martins Creek mill will have an unfair competitive advantage over the Buffalo mills. Since the Commission found that "the marketing of flour is a competitive business with sales turning on as little as a cent or less difference per 100 pounds," the advantage will have serious adverse consequences for the Buffalo mills. (346 I.C.C. at 848; JA, p. 475a).

The foundation stone upon which the Interstate Commerce Act rests is that of absolute equality, not only as to rates, but also as to the conveniences and facilities to shippers in any of the details of transportation service. *United States ex rel Morris v. Delaware, L. & W.R. Co.*, 40 Fed 101. The Supreme Court has said: "The principal evil at which the Interstate Commerce Act . . . was aimed was discrimination in its various manifestations." *State of New York v. United States*, 331 U.S. 296 (1947). In the first volume of its reports and during the first year of its existence, the Commission made it plain that "a common carrier is under obligation to serve the public equally and justly. He must know no friends and concede no unequal favors. The common carrier has no right to select either goods or customers." *Riddle, Dean & Co. v. New York, L.E. & W.R. Co.*, 1 I.C.C. 594. The Commission has followed these principles for over three quarters of a century and there was no basis for departing from them here.

These matters were presented to the Commission and were brushed aside without adequate explanation. In the second report, the Commission recognized the inability of the Buffalo mills to obtain transportation from Twin Cities during the navigation season on the same basis as Martins Creek but found that this is ". . . not such an undue or unreasonable disadvantage as to contravene section 3(1) of the Act." (351 I.C.C. at 478; JA, p. 620a). This approach is the result of the Commission's application of the test condemned by the Court in the *Western Pacific* case, *supra*. Having shown the unequal treatment which is in fact recognized by the Commission to exist, the Buffalo interests met their burden for they do not have the burden of "justifying their claim for equality of treatment." Rather, the railroads have the burden of showing the circumstances justifying unequal treatment. No such showing was made here.

The Commission's error is amply demonstrated by its disposition of the preference and prejudice questions under section 3(1) regarding Twin Cities and Twin Ports. In its initial decision the Commission found that the 72.25 cent rate designed to compete with the water/rail route from Twin Ports was unlawful when applied from Twin Cities. The Commission found that the water competitive rate from Twin Cities was prejudicial to Twin Ports because it neutralized the geographical advantages of Twin Ports. (351 I.C.C. at 475; J 618a). This finding was reversed on the "well-established principle recognizing market competition as valid justification for water-related rates." (351 I.C.C. at 476; JA, p. 619a). The Commission, however, refused to apply this well-established principle to Buffalo. Therefore, the Commission erred in finding that Martins Creek is entitled to a water-related rate from Twin Cities but that Buffalo is not entitled to a water-related rate from Twin Cites. In any event, there is no rail justification for the preference to Martins Creek

by giving it a water-related rate and the prejudice against Buffalo by failing to give it a water-related rate from Twin Cities. The Commission, therefore, erroneously failed to give the Buffalo interests section 3(1) protection as required by law.

XI

CONCLUSION

For all the foregoing reasons, we ask the Court to set aside the Commission's decision and remand the proceeding to the Commission for further consideration and action in accordance with instructions issued from the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of June, 1976, served a copy of the foregoing Brief For Petitioner upon all parties of record in this proceeding, by first class mail properly addressed with postage prepaid.

Patrick McEligot
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